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Supreme Court, U.S.
FILED

No. 03 490 SEP 26 2003

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In The

Supreme Court of the United States

ALLEN HERSCHAFT,

Petitioner,

v.

THE CITY OF NY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTIONS PRESENTED FOR REVIEW

1) Whether there was any precedent for the city of NY to act on the one hand as a regulator for public health and safety concerns by banning the posting of signs and notices on city streets and sidewalks on the one hand and as a generator of revenue by acting in its proprietary capacity on the other, thereby warranting the issuance of a preliminary injunction in our case?

2) Whether the city of NY is impermissibly profiting from the limitation on the exercise of the first amendment rights through the charging of a fee unrelated to the administrative costs to administer said no posting statute by imposing a fine in excess of costs to administer said statute, thereby warranting the imposition of a temporary restraining order in this case?

3) Whether this court should enjoin said no posting statute because of evidence that there was a discriminatory enforcement in this case?

4) Whether if this no posting statute should subsequently be declared unconstitutional by a court of law, whether parliamentary immunity would shield a member of Congress (i.e., Representative Anthony Wiener) from a civil action for damages for violating statutory rights of Plaintiff in this case in another lawsuit to which he would be a named party for possibly violating 42 s. 1983 or under the laws of retaliation under the ADA?

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DATE OF THE ORDER TO BE REVIEWED

Plaintiff seeks review by this Court of an Order by a three judge panel of the US Court of Appeals for the 2nd Circuit dated July 03rd, 2003 affirming and dismissing and denying any relief which would have compelled the lower court to issue a temporary restraining order and a preliminary injunction in this case.

JURISDICTIONAL BASIS FOR THE US SUPREME COURT AND THE FEDERAL COURT IN THE FIRST INSTANCE

This case involves a Federal Question and possible Constitutional Deprivations under the US Constitution. Namely, the First Amendment to the Constitution, Freedom of Speech and the dangers of censorship occurring by the excessive limitation of that freedom.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Amendment #1 of the US Constitution –

"Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

Under the 14th Amendment city ordinances are within the scope of this limitation on governmental authority. *Lovell v. Griffin*, 303 US 444, 58 S. Ct. 666 (1938).

New York City Administrative Code Title 10 s.119. Posting

a. It shall be unlawful for any person to paste, post, paint, print or nail any handbill, poster, notice, sign or

advertisement upon any curb, gutter, flagstone, tree, lamppost, awning post, telegraph pole, telephone pole, public utility pole, public garbage bin, bus shelter, bridge, abutment, elevated train structure, highway fence, barrel, box, parking meter, mailbox, traffic signal stanchion, tree box, bench, traffic barrier, hydrant, public pay telephone, any personal property maintained on a city street or other city owned property pursuant to a franchise, concession, or revocable consent granted by the city or other such item or such structure in any street, or to direct, suffer or permit any servant, agent, employee or other person under his or her control to engage in such activity; provided, however, that this section shall not apply to any handbill, poster, notice, sign or advertisement so posted by or under the direction of the council, or by or under the direction of any city agency, or pursuant to a franchise, concession, or revocable consent granted pursuant to chapter fourteen of the charter.

b. There shall be a rebuttable presumption that the person whose name, telephone number, or other identifying information appears on any handbill, poster, notice, sign or advertisement on any item or structure described in subdivision a of this section in any street violated this section by either (i) pasting, posting, painting, printing or nailing such handbill poster notice sign or advertisement or (ii) directing, suffering or permitting a servant, agent, employee or other individual under such person's control to engage in such activity.

Local Law No. 2 of 2003

To amend the administrative code of the city of New York, in relation to unlawful posting.

Be it enacted by the Council as follows:

Section 1. Section 10-119 of the administrative code of the city of New York, subdivision a as amended by local law number 68 for the year 1995 and subdivision b as added by local law number 111 for the year 1993, and by adding new subdivisions c and d is amended as follows:

s.10-119 Posting. a. It shall be unlawful for any person to paste, post, paint, print or nail or attach or affix by any means whatsoever any handbill, poster, notice, sign, or advertisement or sticker or other printed material upon any curb, gutter, flagstone, tree, lamppost, awning post, telegraph pole, telephone pole, public utility, public garbage bin, bus shelter, bridge, abutment, elevated train structure, highway fence, barrel, box, parking meter, mailbox, traffic [signal] control device, traffic stanchion, traffic sign (including pole), tree box, tree pit protection device, bench, traffic barrier, hydrant, public pay telephone, any personal property maintained on a city street or other city owned property pursuant to a franchise, concession, or revocable consent granted by the city or other such item or such structure in any street, or to direct, suffer or permit any servant, agent, employee or other person under his or her control to engage in such activity; provided, however, that this section shall not apply to any handbill, poster, notice, sign or advertisement, sticker or other printed material so posted by or under the direction of the council, or by or under the direction of any city agency, or pursuant to a franchise, concession, or revocable consent granted pursuant to chapter fourteen of the charter.

b. There shall be a rebuttable presumption that the person whose name, telephone number, or other identifying information appears on any handbill, poster, notice, sign or advertisement, sticker or other printed material on

any item or structure described in subdivision a of this section in any street violated this section by either (i) pasting, posting, painting, printing, nailing, or attaching or affixing by any means whatsoever such handbill poster notice sign or advertisement, sticker or other printed material or (ii) directing, suffering or permitting a servant, agent, employee or other individual under such person's control to engage in such activity.

c. There shall be a rebuttable presumption that if a telephone number that appears on any handbill, poster, notice, sign or advertisement placed in violation of subdivision a of this section belongs to a telephone answering service and no other telephone number or address is readily obtainable to locate the person or business advertised therein, such telephone answering service shall be held liable for a violation of subdivision a in accordance with the provisions of section 10-121.

d. The commissioner of the department of sanitation shall be authorized to issue subpoenas to obtain official telephone records for the purpose of determining the identity and location of any person or entity reasonably believed by the commissioner to have violated subdivision a of this section.

Section 2. Section 10-120 of the administrative code of the city of New York, as amended by local law number 111 for the year 1993, is amended to read as follows:

Section 10-120. Protection of city advertisements. It shall be unlawful for any person to tear down, deface or destroy any notice, handbill, sign, advertisement, poster, sticker or other printed material, put up or posted by, or under the direction of the council or by or under the direction of any city agency or pursuant to a franchise, concession or

revocable consent granted pursuant to chapter fourteen of the charter.

Section 3. Subdivisions a and b of section 10-121 of the administrative code of the city of New York, subdivision a as amended by local law number 111 for the year 1993, and by adding new subdivision g are amended to read as follows:

a Any person convicted of a violation of any of the provisions of sections 10-119 or 10-120 of the code shall be punished by a fine of not less than [fifty] seventy-five dollars nor more than one hundred fifty dollars, for the first offense and not less than one hundred fifty dollars nor more than two hundred fifty dollars for the second and each subsequent offense, within a twelve month period, plus the cost of removal of the unauthorized signs, imprisonment for not more than ten days, or both; provided, however, that, subdivision b of section 10-119 of the code shall not apply with respect to criminal prosecutions brought pursuant to this subdivision.

b. In the instance where the notice of violation, appearance ticket or summons is issued for breach of the provisions of sections 10-119 or 10-120 of the code and sets forth thereon civil penalties only, such process shall be returnable to the environmental control board, which shall have the power to impose the civil penalties of not less than [fifty] seventy-five dollars nor more than one hundred fifty dollars for the first offense and not less than one hundred fifty dollars nor more than two hundred fifty dollars for the second and each subsequent offense, within a twelve month period. Anyone found to have violated the provisions of sections 10-119 or 10-120, in addition to any

penalty imposed, shall be responsible for the cost of the removal of the unauthorized signs.

* * *

g. For the purposes of imposing a criminal fine or civil penalty pursuant to this section, every handbill, poster, notice, sign or advertisement pasted, posted, painted, printed, or nailed in violation of section 10-119 of the code or torn down, defaced or destroyed in violation of section 10-120 of the code, shall be deemed to be the subject of a separate violation for which a separate criminal fine or civil penalty shall be imposed.

Section 4. Chapter one of title ten of the administrative code of the city of New York is amended by adding a new section 10-121.1 to read as follows:

Section 10-121.1. Rewards for providing information leading to criminal conviction of a person for unlawful posting. The mayor, upon the recommendation of the sanitation commissioner, the transportation commissioner, the parks and recreation commissioner, the citywide services commissioner or the police commissioner, shall be authorized to offer and pay a reward in an amount not exceeding five hundred dollars to any person who provides information leading to the criminal conviction of any person who may have violated the provisions of section 10-119 or section 10-120 of the code. No police officer, peace officer or any other law enforcement officer, and no officer, official or employee of the city of New York shall be entitled, directly or indirectly, to collect or receive any such reward.

Section 5. This local law shall take effect immediately.

STATEMENT OF THE CASE

Plaintiff was a candidate in the 2001 general election in the 48th councilmanic district in Brooklyn for a seat on the NY City Council. For many months prior to the election in November, 2001 Plaintiff had posted through his own efforts and those of others, bumper stickers the size of 3" x 12" and stickers the size of 3" x 5" on lampposts and fire alarm boxes throughout his district to make his name known that he was running for office.

Approximately two months after the election was over in the early to mid January, 2002, the Petitioner received several phone calls from Congressman Anthony Weiner's office that there had been numerous complaints in the district where Congressman Weiner's office had overlapped with that of the district that Petitioner was seeking in the election. Weiner's representative told Petitioner that he should take down those bumper stickers because Plaintiff was in violation of the city's no posting statute Title 10 s.119 of the NY Administrative Code that Petitioner heretofore was not familiar with.

When Petitioner researched said statute he told Weiner's representative that the statute only prohibited the posting of notices and ads on city property and did not say anything about taking down those stickers.

During the third week in January, while the phone calls still persisted from Weiner's office to take down those stickers, Petitioner visited Representative Weiner's office personally. On that day Petitioner met with Anthony Weiner himself. At that meeting Weiner repeated that there were numerous complaints in the district, that Plaintiff should take down those stickers and threatened Plaintiff that if he did not do so that day or the next at the

latest, he would have Plaintiff be issued numerous summonses for the numerous violations of Plaintiff regarding the no posting statute. He in fact told Plaintiff that "petitioner better be very rich" as violations could mount for Plaintiff in the tens of thousands of dollars if Plaintiff would not take down those stickers. Thus it was clear at that meeting, Representative Weiner had a malicious intent to hurt Plaintiff's interests in politics and with regard to the Plaintiff's property, with respect to the threats that he made against Plaintiff.

On January 30th, 2002, Petitioner filed with the clerk of the Eastern District Court in NY, a complaint and order to show cause challenging said no posting statute Title 10 s.119 of the NY Administrative Code. A memorandum of law in support of the order to show cause for a Preliminary Injunction and Temporary Restraining Order was also filed that day. After other papers were filed by the Defendant and Plaintiff on Feb. 15th, 2002, Magistrate Judge Bloom issued a Report and Recommendation that denied Petitioner's motion for a TRO and Preliminary Injunction. (On Feb. 4th, 2002 the matter was referred to Magistrate Judge Bloom by Judge Amon).

On Feb. 22nd, 2002 Petitioner filed a Motion to Amend the Complaint and on March 13th, 2002 Petitioner filed a motion for sanctions under FRCP Rule 11. On April 24th, 2002 Magistrate Judge Bloom granted the Plaintiff's Motion to Amend the Complaint and denied Plaintiff's motion for sanctions under FRCP Rule 11.

On May 24th, 2002 Judge Amon adopted in its entirety the Report and Recommendation of Magistrate Judge Bloom. Also it should be noted that prior to this decision the parties had fully briefed the Court regarding

Defendant's motion to dismiss the case under FRCP Rule 12(b)(6).

On June 13th, 2002 Plaintiff sought relief from the lower court's decision by way of a Writ of Mandamus being filed in the US Court of Appeals for the 2nd Circuit's clerk's office.

On September 12th, 2002 Plaintiff received word that his Petition for Writ of Mandamus was being denied because Plaintiff's case lacked the exceptional circumstances needed for its consideration and ultimate determination.

Shortly thereafter, Plaintiff decided to appeal this ruling to the US Supreme Court and according to the Rule number 12 of the Supreme Court Rules Appellant has 90 days after judgment has been rendered in which to make an appeal.

Subsequently, after 30 days had passed after the Mandamus decision by the 2nd Circuit to dismiss the petition but less than the 90 days to appeal to the US Supreme Court, Appellant abandoned his Writ of Certiorari to the US Supreme Court and decided that he would pursue an Interlocutory Appeal of the District Court's Denial of Appellant's Motion for a Temporary Restraining Order and Preliminary Injunction, by filing a Notice of Appeal with the District Court on October 24th, 2002.

Subsequent to this the 2nd Circuit Court of Appeals agreed to hear the case by issuing a scheduling order. During the drafting of the briefs, new local laws were passed by the city of New York which substantially amended the no posting statute which was the subject in dispute, but Defendant Corporation Counsel failed to

notify or alert the Court or the parties of such changes. After the original briefs were filed, Appellant sought by way of a Motion to expedite the Oral Argument to the month of June because the case had to be handled speedily as an election was involved early during the month of Sept., 2003, which was granted.

Shortly thereafter, Appellant motioned the Court to allow the parties to submit emergency briefs to address new issues that were raised by the new local laws. This was granted. In addition, the Appellant requested sanctions against the Defendant for inexcusable neglect in not alerting the Court about local law 2 of 2003 being enacted into law in Jan., 2003. This was denied.

Although Oral Argument in the case was to be held on June 20, 2003, the new briefs were submitted by the parties during the first and second weeks of June, 2003 just prior to the Oral Argument as mandated by the Court.

On June 20th, 2003 there was an Oral Argument before a three judge panel consisting of Chief Judge John Walker, and Circuit Judges Leval and Katzmann. On July 3rd a Summary Order was issued by the same three judge panel, which affirmed the lower court's and the magistrate's decision to deny the issuance of a temporary restraining order and preliminary injunction. On July 24, 2003 the Summary Order was converted to a Mandate.

It should be pointed out that although Plaintiff was knocked off the ballot by his opponent in July of 2003 and thus did not participate in the September, 2003 Democratic primary election for City Council, he remains a candidate in the 2004 – September Democratic primary for State Assemblyman.

REASONS RELIED ON FOR GRANTING THE WRIT

There are several reasons relied on for allowance of the Writ including: 1. The fact that the District Court's opinion was not in line with US Supreme Court precedent; 2. That there is a split amongst the Circuits on an important issue involving the First Amendment.

I. CONTRARY TO US SUPREME COURT PRECEDENT

A. The city of NY is impermissibly profiting from the limitation on the exercise of the first amendment rights through the charging of a fee or fine unrelated to the administrative costs to administer said no posting statute, which runs contrary to US Supreme Court precedent.

Basically, according to the legislative history of Local Law 2 of 2003, the city of NY is substantially raising revenue 2-4 million dollars which is estimated for the city of NY to raise in fiscal year 2004 and in succeeding years, this according to the government's own estimates (See Appendix).

Plaintiff contends here that through said no posting statute Defendant will be raising revenue. And that this will be illegal according to the case, *Atlanta Journal & Constitution v. City of Atlanta, Dept. of Aviation*, 277 F. 3rd 1322, 1327 (11th Cir., Jan. 2002) citing US Supreme Court precedent – *Murdock v. Pennsylvania*, 319 US 105 (1939); *Cox v. New Hampshire*, 312 US 569, 577 (1941). "While a fee to defray the administrative costs of a licensing scheme is permissible, government is forbidden from using

such a fee to raise revenues," *Atlanta Journal & Constitution, id.* citing *Cox v. New Hampshire, id.*

It should be noted that in the *Members of the City Council v. Taxpayers for Vincent* case, 104 S. Ct. 2118, 2122 (1984), in the statute in question in the case there was a clear recognition that government was forbidden to raise revenues instead of merely defraying the costs associated with administering said statute which is permissible and is notably absent in our case. For example footnote number 1 which begins on page 2121 of the Supreme Court Reporter edition of the case states on page 2122 under provision (c) of said statute that " . . . The person responsible for any such illegal posting shall be liable for the cost incurred in the removal thereof and the Department of Public Works is authorized to effect the collection of said cost."

In the case *Cox v. New Hampshire*, 61 S. Ct. 762, 766 (1941) it was stated "[t]here remains the question of license fees which, . . . had a permissible range from $300 to a nominal amount. . . . The fee was held to be 'not a revenue tax, but one to meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed.'"

This is not the case here, since Plaintiff has provided at the back of this petition, legislative history which states that through the enforcement of said statute revenue would be substantially increased, without additional expenditures associated with the statute's enforcement.

Furthermore, in *Hull v. Petrillo*, 439 F. 2nd 1184 at 1186 (1971), it is asserted, "the ability to pay is not a legitimate criterion for the state to employ in determining

who is to express his views on its streets and who is not. Therefore, any fee imposed as a prerequisite to the exercise of the right to communicate ideas on the public sidewalks is an unconstitutional prior restraint upon the freedom of expression." *Citing Kunz v. City of NY*, 340 US 290, 294 (1951) and *Niemutko v. Maryland*, 340 US 268, 271 (1951).

B. There was evidence provided of discriminatory enforcement in this case, which clearly runs contrary to US Supreme Court precedent.

According to the case *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 US at 804, 104 S. Ct. at 2128, the general principle that has emerged from the *Stromberg v. California*, 283 US 359, 51 S. Ct. 532 and *Lovell v. Griffin*, 303 US 444, 58 S. Ct. 666 line of cases is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others, "[a]s *Stromberg* and *Lovell* demonstrate, there are some purported interests, such as a desire to suppress support for a minority party or as unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas – that are so plainly illegitimate that they would immediately invalidate the rule."

According to the case, *City of Cleburne v. Cleburne Living Centers*, 473 US 432, 439, 105 S. Ct. 3249 (1985) the Equal Protection clause requires that the government treat all similarly situated people alike and that the prototypical Equal Protection claim also involves discrimination against people based on their membership in a vulnerable class.

The case, *Harlen Assoc. v. Incorporated Village of Mineola*, 273 F. 3rd 494, 499 (2nd Cir., Nov. 2001) states that to prevail on a claim of selective enforcement, in violation of the Equal Protection clause, Plaintiffs must show both (1) that they were treated differently from other similarly situated individuals and (2) that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights or malicious or bad faith intent to injure a person. *Id.*

The article included at the end of this petition was originally included in Plaintiff's Sur Reply brief. Dated Nov. 20, 2000 found in the Kings Courier entitled "Post At Your Own Risk: New Crackdown on Illegal Signage" admits that disparate enforcement has been a problem with this law and that the Brooklyn Borough Board as a result "called for the City Council to adopt a budget modification that would divide resources equally among the boroughs for inspections and the adjudication of violators."

Although the article does not specifically state directly about disparate enforcement of antiposting law regarding political candidates (Plaintiff sought the Records of the Bay News and Kings Courier from Sept. – Dec. 2000 where there were questions raised about Noach Dear's (a local city councilman at the time contesting representative Weiner's seat) Illegal Postings and whether he was ever issued a summons in their articles but they only provided some of the information) should this case ever go to trial or if the case should proceed further Plaintiff would like to subpoena relevant documents from the Bay News and or Kings Courier to further determine the extent and magnitude of disparate enforcement of the Illegal Postings

statute and the effect that this had on disparate enforcement during and after political campaigns.

To the extent that there have been disparate enforcement of the No-Posting Statute and the article does provide evidence of this, Plaintiff would like to attribute Rep. Anthony Wiener's attempt to have Plaintiff take down his bumper stickers based on a malicious attempt to get Plaintiff to withdraw from the campaign by threatening Plaintiff with tremendous dollar liability for his postings which were acts which took place months earlier.

So as can be seen from the above, there is clear evidence of impermissible disparate enforcement of the anti-posting statute and whether it was based on impermissible considerations such as discrimination against Plaintiff based on his disability under the ADA or alternatively to deprive Plaintiff of his civil or statutory rights under 42 USCA s.1983 and the attempt at getting him to withdraw from the race or alternatively, whether Rep. Weiner was simply maliciously attempting to threaten or harm Plaintiff's interests are all issues that will need to be investigated very carefully as the case proceeds.

II. There appears in this case a split amongst the circuits on an important First Amendment issue

Judge Amon in her decision in *Herschaft v. City of NY*, 2002 US Dist. Lexis 9561 at *9 (EDNY, May 24th, 2002) discusses the split amongst circuits – that the *Atlanta Journal and Constitution* holding was contrary to the law of the Second Circuit, announced in *Gannett Satellite Info. Network, Inc. v. Metropolitan Transportation Authority*, 745 F. 2nd 767 (2nd Cir., 1984), that when the government

acts in a proprietary capacity it may impose fees for the use of space.

Plaintiff objects to Judge Amon's assertion in the following way. If the government is operating in its proprietary capacity and not in its governmental capacity it could do so on its Railroad, Bus and Airport system because there does seem to be precedent for raising revenue. But not what is being attempted here in this case, to ban all postings citywide while allowing revenue generation to take place where heretofore there was no revenue raising or proprietary capacity before, on the city streets and sidewalks where the city operates traditionally in its governmental capacity.

Plaintiff has done considerable research and investigation into the theory and practice behind the government's ability to regulate or ban advertising or speech on city streets or highways. Not one article or case justifies the assertion made by the counsel for the Defendant in her declaration in response to the objections by Plaintiff to the Magistrate Judge's Report and Recommendation under 28 USC s.1746 paper dated Feb. 27, 2002, under paragraphs 13 and 14 of said document that the city of New York can somehow delegate its own proprietary capacity to its city agencies as set forth in the challenged statute to allow or permit certain speech while disallowing all others.

The Defendant cites in Paragraph #14 the case, *New York Magazine v. Metropolitan Transportation Authority, et al.*, 136 F. 3rd 123, 129 (2nd Cir., 1998) as authority for this novel proposition. But a careful reading of the case is not authority for the approach that the city can delegate its proprietary capacity to a city agency to regulate or ban or allow speech on a public thoroughfare through an

enactment of a public law, but rather to the extent that a city agency could regulate speech in a forum under its jurisdiction under its proprietary capacity would appear to come from its own inherent proprietary ability to do so and not from any delegation done so through public enactment.

In its Memorandum Regarding Its Motion to Dismiss the Amended Complaint of March 25, 2002, the Defendant cites *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F. 2nd 767 (2nd Cir., 1984) as support for its argument that the city of NY can generate revenue in its proprietary capacity while at the same time banning all public postings on public property under its role as Regulator of the Public Health and Safety. This case does not do this. The Second Circuit approved in this case a revenue generating fee for the city agency the MTA because it was acting in its proprietary capacity. This is not what is being done here. In our case the city as a whole is attempting to act in a dual capacity and its ability to do so is being questioned by Plaintiff who believes that this is an attempt by the city is without precedent and justification.

Also it should be pointed out that in *Gannett, id.* 745 F. 2nd 767, 774 the following is noted "Ordinarily a government cannot profit by imposing licensing or permit fees on the exercise of a first amendment right. . . . In those cases in which licensing fees were prohibited, however, the government was acting in a governmental capacity and was raising general revenue under the guise of defraying its administrative costs."

Here in our case, the government seeks to act to ban postings based on public interest objectives of health and safety, at least in part as well as blatantly raising general revenue in its proprietary capacity at least that is what is argued which is not under the guise of defraying its administrative costs so that it appears that what the city is trying to do in this case is not permissible according to the above case law, because the city is trying to have it both ways (raising revenue while acting in a governmental capacity).

Further, in its Memorandum in Support of its Motion to Dismiss, Defendant cites *Jacobsen v. City of Rapid City, SD*, 128 F. 3rd 660 (8th Cir., 1997) as authority for the proposition that the city could act in a proprietary capacity and ban private news racks from its airport. Two points can be made with respect to this case. One is that the city collectively involved in the case included the city and its airport administrator, thereby involving one of its agencies which has the opportunity to act in a proprietary capacity (trains, buses and airports). Second, although the Court held that the city could ban private commercial news racks in its airport to generate revenue, it also held that city's interests in safety and aesthetics amongst others did not justify its ban of commercial news racks in the city airport terminal. This fact should be kept in mind by this Court.

According to *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F. 2nd 767 (2nd Cir., 1984) at 770, the MTA is a public benefit corporation which was organized under the Metropolitan Transportation Authority Act, NY Public Authorities Law ss.1260-1278, and the MTA, which through its subsidiaries, the Long Island Railroad Company and Metro North Commuter Railroad Company, operates the Long Island,

Harlem, and New Haven Commuter railroad lines. The state acquired these privately owned lines (which encompasses 213 stations and carries approximately 451,850 passengers each day) after their "financial situation and physical condition deteriorated. . . . " The MTA was given authority to establish the "fares, tolls, rentals, rates, charges, and other fees" for the use and operation of its facilities necessary to maintain its operation on a "self-sustaining basis". Citing NY Public Authorities Law ss.1261 (14) and s.1266 (3) (McKinney's 1999).

A few points are in order here about the No Posting statute vis a vis the *Gannett Satellite Information Network* case. 1. The city of NY never got permission from the State of NY to raise revenue like they are able under the present law to do so through franchise, concession or revocable consents. See Title 10.119(a) of the NY City Administrative Code and Charter, therefore what it has done is ultravires as I have argued all along (for discussion of fiscal state local relations, see the following: JOSEPH F. ZIMMERMAN, STATE LOCAL RELATIONS: A PARTNERSHIP APPROACH (1983) pgs. 49-51); 2. In the *Gannett* case where it was determined that "although the state's purpose in acquiring and operating the railroads is to preserve the state's economy by providing efficient commuter passenger service which is an essential government function, the management of station facilities is a proprietary, not a governmental function". *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority,* 745 F. 2nd 767 (2nd Cir., 1984) at 774. Here in our case, unlike *Gannett*, the management and supervision of public property on highways and streets is a distinctly governmental function. Further as noted, in *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation*

Authority, 745 F. 2nd 767 (2nd Cir., 1984) at 775, "the legislature attempted to preserve the lines' commercial status by establishing the MTA as a public benefit corporation and by making the MTA a self sustaining entity."; 3. Further as noted in *Gannett Satellite Information Network, Inc. v Metropolitan Transportation Authority,* 745 F. 2nd 767 (2nd Cir., 1984) at 775 – "any revenue raised by the MTA does not go into the general coffers," but is used for the operation of the railroad lines. This is not the case for the city of NY, where any money raised will go into the public-citywide coffers.

Thus it appears what the Second Circuit courts have allowed the city of NY to do is to raise revenue which is being done in large measure by not following/ disregarding its own criteria as set forth in *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority,* 745 F. 2nd 767 (2nd Cir., 1984). I am now asking the US Supreme Court to look closely into this matter as it appears that the Second Circuit has not sufficiently exercised its supervisory position by allowing such revenue generation to take place given the circumstances as described above.

The US Supreme Court has previously stated, "In cases in which there is a claim of denial of rights under the Federal Constitution, this (the US Supreme Court) Court is not bound by the conclusions of the lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." *Niemotko v. State of Maryland,* 71 S. Ct. 325 at 327 (1951).

In conclusion, what the city of NY proposes to do under its no posting statute is unprecedented. It is unprecedented to raise revenue and at the same time disallow

virtually all other postings based on the government's health and safety function. It is unfair. The city allows some postings, those which will pay a fee to it or to a city agency while disallowing all other postings. As noted earlier, the city can't rely on the MTA case because it needs state approval to raise revenue, therefore what it has done is ultravires. Also it isn't in line with the history of the MTA and its allowance as a quasi-government agency to raise revenue. Therefore, because its history doesn't parallel that of the MTA, the Court's justification for allowing the city of NY to raise revenue is called into question particularly when it is clearly operating in a traditional governmental capacity.

Respectfully submitted,

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MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

(Filed Jul. 3, 2003)

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 3rd day of JULY, two thousand and three.

PRESENT:

Hon. John M. Walker, Jr.
Chief Judge,
Hon. Pierre N. Leval,
Hon. Robert A. Katzmann,
Circuit Judges.

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ALLEN STUART HERSCHAFT,
Plaintiff-Appellant,

-v.- **No. 02-9292**

MICHAEL BLOOMBERG, Mayor, New York City Council,
Defendant-Appellee.

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APPEARING FOR APPELLANT: **Allen Stuart Herschaft, *pro se*, Brooklyn, NY**

APPEARING FOR APPELLEES: **Edward F.X. Hart, Law Department, City of New York, New York, NY**

Appeal from the Unite States District Court for the Eastern District of New York (Carol Amon, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is **AFFIRMED**.

Allan Herschaft, *pro se*, appeals from the district court's denial of his motion for a preliminary injunction challenging the constitutionality of New York City Administrative Code and Charter § 10-119, which bans the posting of signs on certain city property. Herschaft contends that the ordinance is overbroad, that it chills speech, and it violates the Equal Protection Clause. He sought declaratory, preliminary and permanent injunctive relief, as well as monetary damages. The district court held that New York City's ban on posted signs was narrowly tailored

to achieve the significant government interests in prevention of litter and preservation of aesthetics. *See Herschaft v. City of New York*, 2002 U.S. Dist. LEXIS 9561 (E.D.N.Y. May 24, 2002).

This court reviews a district court's denial of a motion for a preliminary injunction for abuse of discretion. *See Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996). However, this Court is required to do an independent examination of the whole record because the challenge concerns rights under the First Amendment. *Id.* In order to warrant the grant of a preliminary injunction, Herschaft had to show "irreparable harm and either (a) a likelihood of success on the merits or (b) a sufficiently serious question going to the merits, with a balance of hardships tipping in favor of the party requesting the preliminary injunction." *Tunick v. Safir*, 209 F.3d 67, 70 (2d Cir. 2000). For a content-neutral restriction on speech in a public forum to withstand constitutional scrutiny under the First Amendment, it must be narrowly tailored to serve a significant government interest and leave open ample alternative channels for communication of the information. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Herschaft fails to meet the standard for granting a preliminary injunction. Because deprivations of First Amendment rights are deemed irreparable, Herschaft's allegations met the first prong of the test, but he does not demonstrate a likelihood of success on the merits or a serious question on the merits. First, the City has a significant interest in its appearance and in preventing litter which can be created by signs of any size. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807, 814-15 (1984) (holding that a Los Angeles anti-posting

ordinance prohibiting a city council candidate from posting signs on utility poles was constitutional). Second, because the nature of the medium of sign posting is to create litter, the posting ordinance is narrowly tailored in responding "precisely to the substantive problem which legitimately concerned the City." *Id.* at 810 (clutter is "not merely a possible by-product of [posting signs], but is created by the medium of expression itself"). Third, the ordinance leaves open ample alternative means for communicating the information and is content neutral in its own terms. N.Y. Code § 10-119 (prohibiting the "post[ing of] any handbill, poster, notice, sign or advertisement upon any . . . lamp-post, . . . telephone pole, public utility pole, [or] box," without regard to the message being conveyed).

Herschaft has failed to show that the statute was being enforced in a discriminatory way, and he admits he had no evidence that political speech was being targeted for enforcement of the statute. Herschaft requests that we consider the passage of new local laws amending the posting statute, but the amendments do not change the nature of the restriction itself, and thus they do not increase the likelihood of Herschaft's success on the merits. Herschaft also claims that the ordinance impermissibly imposes a fee unrelated to administrative costs. However, the ordinance imposes a fine as a deterrent sanction, not as a fee for permitted use.

We have reviewed Herschaft's other claims and find them to be without merit. Finally, if Herschaft pursues his legal claims, the parties and the district court may wish to address whether Herschaft has standing to challenge the posting statute. *See Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983); *Bordell v. General Electric Co.*, 922 F.2d 1057, 1060-61 (2d Cir. 1991).

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

By:

/s/ Lucille Carr
Lucille Carr, Deputy Clerk

A TRUE COPY
Roseann B. MacKechnie, CLERK

by [Illegible]
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ALLEN HERSCHAFT Plaintiff, -against- CITY OF NEW YORK, Defendant.	:	MEMORANDUM & ORDER 02-CV-677 (CBA) (LB)

AMON, UNITED STATES DISTRICT JUDGE:

BACKGROUND

The Court has received the Report and Recommendation ("R & R") of the Honorable Lois Bloom, United States Magistrate Judge, dated February 15, 2002. Magistrate Judge Bloom recommended that this Court deny the plaintiff's order to show cause for a preliminary injunction and temporary restraining order. Plaintiff has filed several objections to Judge Bloom's R & R. For the reasons set forth below, the Court adopts the recommendation of Judge Bloom in its entirety.[1]

DISCUSSION

On this order to show cause for a preliminary injunctive relief, plaintiff bears the burden of showing that he is

[1] Plaintiff previously filed a motion for this Court to recuse itself from this case, see Mot. Recusal dated February 19th, 2002, docket # 14, which he subsequently withdrew, *see* Od. Lois Bloom Apr. 23, 2002. Accordingly, this Court will consider and rule on plaintiff's objections to Judge Bloom's R & R.

likely to suffer irreparable harm and that he has a likelihood of success of prevailing on the merits of the action. *Beal v. Stern,* 184 F.3d 117, 122 (2d Cir. 1999). The Supreme Court has commented that a "preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 129-130 (2d ed. 1995)) (per curiam). Plaintiff has not made such a showing here.

For a content-neutral restriction on speech in a public forum to withstand constitutional scrutiny under the First Amendment, it must be narrowly tailored to serve a significant government interest and leave open ample alternative channels for communication of the information.[2] *Ward v. Rock Against Racism,* 491 U.S. 781, 791

[2] As Magistrate Judge Bloom did, this Court reviews the ordinance under the level of scrutiny required for government limitations on speech in public fora. Regulation of speech on property that has either traditionally been held open for public expression (the traditional public forum) or designated by the government for such use (the designated public forum) is subject to the highest scrutiny. *See International Society for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678 (1992). In such environments, a government may impose content-neutral time, place, and manner restrictions that are narrowly tailored to serve a significant government interest and leave open ample other means of communication. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983); *Lebron v. National R.R. Passenger Corp. (AMTRAK),* 69 F.3d 650, 655 (2d Cir. 1995). Because the Court finds that the ordinance survives this "highest scrutiny," *Krishna,* 505 U.S. at 678, it does not address the City's contention that the property at issue is a limited public forum or nonpublic forum, in which government restrictions on speech need only be reasonable and viewpoint neutral. *See Perry v. McDonald,* 280 F.3d 159, 166-67 & n.4 (2d Cir. 2001).

(1989). Plaintiff challenges Judge Bloom's finding that the ordinance is narrowly tailored to a significant government interest. Contrary to plaintiff's position, the City does have a significant governmental interest in preventing litter and preserving esthetics, the rationale underlying the ordinance. *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 805-07 (1984); *Paulsen v. Gotbaum,* 982 F.2d 825, 829-30 (2d Cir. 1992).

Plaintiff contests Judge Bloom's determination that a total ban on signs is narrowly tailored to this interest. The Supreme Court has held that bans on leafleting are not justified by a governmental interest in preventing litter. *See Schneider v. State,* 308 U.S. 147 (1939). However, the Supreme Court in *Vincent* differentiated leafleting from the posting of signs when the government was trying to ameliorate the visual clutter and poor esthetics caused by the posting. The Court distinguished the leafleting cases as involving circumstances in which "individual citizens were actively exercising their right to communicate directly with potential recipients of their message." The Court observed that unlike leafleting, in which the "conduct continued only while speakers or distributors remained on the scene," posted signs "remain[ed] unattended until removed." 466 U.S. at 809. The Court then analogized sign posting to "actually throw[ing] papers in the street," *id.* at 809 (quoting *Schneider v. State,* 308 U.S. 147, 162 (1939)), because the substantive evil attacked by the City, visual clutter, was "not merely a possible by-product of the activity, but is created by the medium of expression itself," *id.* at 810. Thus, the Court found that in the case of signs the evil was created by the actual expression. Accordingly, the ordinance in *Vincent*

was narrowly tailored because it responded "precisely to the substantive problem which legitimately concern[ed] the City." *Id.* at 810.

Although the primary evil the City in *Vincent* sought to ameliorate was visual clutter, the rationale of *Vincent* applies with equal force to litter, the problem the ordinance here sought to abate. Plaintiff's signs, unlike direct communication in leafleting, remain posted until they create the evil attacked by the City. Wind and rain erode the signs and create litter.[3] Unlike the leafleting cases, there is no way that the City could attack the evil created by the signs other than by banning them; it can not stop the wind and the rain. This brings plaintiff's case directly in line with the reasoning of *Vincent.*

The size of plaintiff's signs does not affect the *Vincent* analysis. Plaintiff's smaller signs create as much of a litter problem as the larger signs at issue in *Vincent.* Even small signs, especially in large numbers, would create a litter and sanitation nuisance.

Plaintiff also challenges the legitimacy of the government's stated interest in litter because the ordinance permits the posting of signs by city agencies and pursuant to a franchise, concession, or revocable consent. The Supreme Court in *Metromedia v. City of San Diego,* 453 U.S. 490 (1981) rejected a similar argument pertaining to

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[3] The legislative history plaintiff attached to his memorandum of law in support of the preliminary injunction indicates that the City Council was concerned that posted signs would "wind up in the gutter or on the sidewalks as a result of wind, rain, and vandalism, thereby creating litter and additional work for the sanitation force."

commercial billboards. The ordinance at issue in *Metromedia* banned "off-site" commercial billboards but permitted those that were "on-site," meaning billboards that were erected on an establishment's own property that advertised the goods and services available there. The *Metromedia* plurality found this to be a permissible distinction, despite the argument that permitting some signs belied the city's stated interests in esthetics and traffic safety. The plurality stated "[i]t does not follow from the fact that the city has concluded that some commercial interests outweigh its municipal interests in this context that it must give similar weight to all other commercial advertising. Thus, offsite commercial billboards may be prohibited while onsite commercial billboards are permitted." *Id.* at 512.

The *Vincent* Court approved this reasoning with respect to the sign posting ban. In *Vincent,* the appellees argued that the City could not justify its ban on sign postings on public property by esthetic interests when it permitted equally ugly signs on private property. The *Vincent* Court held that, like the on-site, off-site distinction in *Metromedia,* "the validity of the esthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his own property justifies the disparate treatment." 466 U.S. at 811.

In this case, the City argues that it is reasonable for it to have concluded that the need for city agencies to post signs on public property or to raise revenue when acting in its proprietary capacity outweighs its legitimate interests in preventing litter in some cases. At least on the record presently before the Court, the Court finds this position

persuasive. As the Supreme Court in *Vincent* observed, "[e]ven if some visual blight remains, a partial, content-neutral ban may nevertheless enhance the City's appearance." 466 U.S. at 811.

To the extent that plaintiff contends that the City's actions are unconstitutional because it is picking and choosing messages based on their content, he has failed to make a sufficient showing to warrant issuance of preliminary injunctive relief. Plaintiff relies heavily on *Gonzales v. Superior Court,* 226 Cal. Rptr. 164 (Cal. Ct. App. 1986). This reliance is misplaced. The Court initially notes that *Gonzalez* is a decision by an intermediate California Court that relies, in part, on the California Constitution for its holding, which the *Gonzalez* court expressly stated "accords greater protection to the expression of free speech than does the United States Constitution." *Id.* at 167. The controlling standards in this case are those under the United States Constitution.

Moreover, unlike the ordinance considered by the *Gonzalez* court, it is not plain from the face of the instant ordinance what types of messages are permitted and which are not. The face of the *Gonzalez* ordinance permitted messages which described a product, but not an event. Thus, the *Gonzales* ordinance was content-based. In this case, the ordinance excepts only those postings made at the direction of the City or pursuant to franchise, concession, or revocable consent; this exception is made without reference to any content of the signs. Plaintiff has not shown on the record before the Court that the City is using this exception to create an impermissible content-based

restriction.[4] Accordingly, the Court finds that the likelihood of his success on the merits of this claim is not sufficient to justify issuance of his requested injunctive relief.

Plaintiff also objects that the Magistrate Judge's report did not address his allegations of discriminatory enforcement of the statute against unpopular speakers as opposed to incumbents. Although a cause of action can arise for an equal protection violation based on discriminatory enforcement of a statute against unpopular speakers, *see LaTrieste Restaurant and Cabaret, Inc. v. Village of Port Chester,* 40 F.3d 587, 590 (2d Cir. 1994) (imparting that an equal protection claim for differential enforcement may be stated when the treatment was based on an intent to punish the exercise of constitutional rights); *see also Village of Willowbrook v. Olech,* 528 U.S. 562 (2000) (holding that an equal protection claim may be stated for differential treatment based on a "class of one"), plaintiff has not shown a sufficient likelihood of success on this ground to entitle him to a preliminary injunction or temporary restraining order. Plaintiff has offered only supposition, not facts, as to whether the City is enforcing its ordinance against him discriminatorily. He merely suggests in his objections that incumbents are not being asked by the City to remove their signs. This unsupported allegation is insufficient to demonstrate a likelihood of success on the merits and accordingly a preliminary

[4] The Court notes that even content-based restrictions may be upheld if they are narrowly tailored to promote a compelling government interest. *See United States v. Playboy Entertainment Group,* 529 U.S. 803, 813 (2000).

injunction and temporary restraining order are denied on this ground.

Plaintiff argues that Magistrate Judge Bloom failed to address his argument that the city ordinance was punitive because it impermissibly imposes a fee unrelated to administrative costs of speech. This argument is also without merit. Plaintiff relies on a case from the Eleventh Circuit, *Atlanta Journal and Constitution v. City of Atlanta,* 277 F.3d 1322 (11th Cir. 2002). In that case, the City of Atlanta sought to compel newspaper publishers who were selected to receive concession space in city-owned newspaper vending machines to pay a monthly fee for the privilege of that space. The Eleventh Circuit invalidated the fee-for-space provision. The Court notes that the *Atlanta Journal* court recognized that its decision was contrary to the law of this Circuit, announced in *Gannett Satellite Info. Network, Inc. v. Metropolitan Transp. Auth.,* 745 F.2d 767 (2d Cir. 1984), that when the government acts in a proprietary capacity, it may impose fees for the use of space. However, even if the *Atlanta Journal* case was good law in this Circuit, it is inapplicable to the instant case. The city ordinance in this case does not impose a fee for the plaintiff's unauthorized posting on lampposts and other governmental property; it precludes it. The ordinance imposes a fine as a deterrent sanction for those who, like plaintiff, disregard the command of the ordinance. If the ordinance's restriction on speech is permissible, the fact that it imposes a financial or criminal penalty does not invalidate it. *Cf. Hill v. Colorado,* 530 U.S. 703 (2000) (upholding a criminal law creating a buffer zone around clinics as a valid time, place, and manner restriction).

Finally, plaintiff argues that Judge Bloom failed to address his argument that the ordinance is invalid because it permits the government to profit from the exercise of protected speech in the form of granting franchises, concessions, and revocable consents to use the property for postings. Plaintiff has not demonstrated a likelihood of success on the merits sufficient to warrant the imposition of preliminary injunctive relief on this ground. Plaintiff again relies on the *Atlanta Journal* case. As the Court already noted, the law in this Circuit is that the government, when acting in a proprietary capacity, may impose fees on the exercise of speech, provided that they are permissible time, place, or manner restrictions. *Gannett,* 745 F.2d. Plaintiff has not offered any information or argument to rebut the City's claim that it is acting in a proprietary capacity when it permits property to be used subject to a franchise, concession, or revocable consent. Nor has plaintiff offered any facts or argument to indicate that the fee itself is not a permissible time, place, or manner restriction. Plaintiff's assertion of invalidity is simply insufficient to warrant imposition of the extraordinary remedy of preliminary injunctive relief. *See Mazurek,* 520 U.S. at 972.

CONCLUSION

For the reasons stated above, this Court adopts the Report and Recommendation of the Honorable Lois Bloom to deny plaintiff's order to show cause for preliminary injunctive relief.

SO ORDERED.

Dated: Brooklyn, New York
May 24, 2002

/s/ Carol Bagley Amon
Carol Bagley Amon
United States
District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ALLEN HERSCHAFT,
Plaintiff,

-v-

MICHAEL BLOOMBERG, MAYOR and THE NEW YORK CITY COUNCIL.
Defendants.

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REPORT AND RECOMMENDATION

02-CV-0677 (CBA)(LB)

(Filed Feb. 15, 2000)

BLOOM, United States Magistrate Judge:

By order dated January 31, 2002, the Honorable Carol Bagley Amon, United States District Judge, referred plaintiff's order to show cause for a preliminary injunction and a temporary restraining order pursuant to Federal Rule of Civil Procedure 65 to the undersigned for a Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1994 & Supp. V 1999). For the reasons that follow, it is respectfully recommended that defendant's order to show cause for a preliminary injunction and a temporary restraining order be denied.

STATEMENT OF FACTS

Plaintiff challenges the constitutionality of New York City's anti-posting statute, codified in Title 10-119 of the New York City Administrative Code, under the First and Fourteenth Amendments to the United States Constitution. The full text of the challenged provision states:

> a. It shall be unlawful for any person to paste, post, paint, print or nail any handbill, poster,

notice, sign or advertisement upon any curb, gutter, flagstone, tree, lamppost, awning post, telegraph pole, telephone pole, public utility pole, public garbage bin, bus shelter, bridge, abutment, elevated train structure, highway fence, barrel, box, parking meter, mailbox, traffic signal stanchion, tree box, bench, traffic barrier, hydrant, public pay telephone, any personal property maintained on a city street or other city-owned property pursuant to a franchise, concession or revocable consent granted by the city or other such item or structure in any street, or to direct, suffer or permit any such activity; provided, however, that this section shall not apply to any handbill, poster, notice, sign or advertisement so posted by or under the direction of the council, or by or under the direction of any city agency, or pursuant to a franchise, concession or revocable consent granted pursuant to chapter fourteen of the charter.

b. There shall be a rebuttable presumption that the person whose name, telephone number, or other identifying information appears on any handbill, poster, notice, sign or advertisement on any item or structure described in subdivision a of this section in any street violated this section by either (i) pasting, posting, painting, printing or nailing such handbill, poster, notice, sign or advertisement, or (ii) directing, suffering or permitting a servant, agent, employee or other individual under such person's control to engage such activity.

Plaintiff alleges that the challenged statute is overbroad. Complaint ¶ 4. He states that his First Amendment rights have been chilled because he is "having difficulty campaigning for political office for fear of being prosecuted

under said statute." Plaintiff's Memorandum of Law in Support of Order to Show Cause for Preliminary Injunction and Temporary Restraining Order ("Plaintiff's Memo"). Plaintiff states that a staff member in Congressman Anthony Weiner's office told him that there had been "numerous complaints in the community regarding the bumper stickers that Plaintiff had placed on lampposts in the district that plaintiff had run in, in the 2001 elections for the N.Y. City Council in the 48th Councilmanic [sic] district of Brooklyn." Complaint ¶ 5. Plaintiff alleges that the anti-posting statute chills his political speech by interfering with his right to campaign for a city council seat in 2003 and "subjects him to possible tremendous dollar amounts in fines." Plaintiff's Response Memo of Law at 4 Plaintiff contends that the statute is being "unevenly enforced and appears to be enforced in an arbitrary manner by threats." *Id.* at 5. Plaintiff therefore asserts that the statute is both discriminatory as applied and overbroad. Complaint ¶ 6.

On February 11, 2002, the parties appeared before the Court. At the conference, the Court questioned whether the named defendants were the proper defendants. Upon the consent of the parties, the caption of this case is hereby amended to reflect the City of New York as the only defendant; Mayor Michael Bloomberg and the City Council shall be removed as defendants.

The Court inquired when the next election was scheduled to take place. Plaintiff responded that "[t]he primary election is in September. The general election is in November of 2003." Transcript of proceedings held on February 11, 2002 at 2 ("Transcript"). Plaintiff further stated:

> Let me just explain to you. If you're questioning the emergency of this nature, first of all, we're talking about political speech, the ability to be able to get across one's ideas, one's name to the public to be elected. So in other words, if the statute is prohibiting speech, which I claim it is, then obviously – I'm always in a campaign mode. I'm ready for the 2003 election right now. Therefore, I cannot put up any bumper stickers for the 2003 election and plus, there's possible liability for the 2001 election.

Transcript at 7.

When asked whether he had ever been given a summons or fine from the City for violation of the anti-posting statute or whether the City had notified him that he had violated the statute by posting his bumper stickers, plaintiff answered no. Transcript at 6.

DISCUSSION

I. Preliminary Injunction Standard

In order for the Court to grant an application for a preliminary injunction, plaintiff must demonstrate, first, that he is likely to suffer irreparable harm and second, that there is a likelihood of prevailing on the merits of the action. *Bery v. City of New York,* 97 F.3d 689 (2d Cir. 1996). A challenge based on a violation of First Amendment rights satisfies the first part of the plaintiff's burden since "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Hsu v. Roslyn Union Free School District,* 85 F.3d 839, 853 (2d Cir. 1996) (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976)). Since irreparable harm is presumed

here, we move on to the second consideration, the merits of the action.

> Ordinarily, the movant then has two options: it must either demonstrate a likelihood of success on the merits or it must raise "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." However, in a case in which "the moving party seeks to stay governmental action taken in the public interest pursuant to a statutory or regulatory scheme," the injunction should be granted only if the moving party meets the more rigorous likelihood of success standard.

Bery v. City of New York, 97 F.3d at 693 (citations omitted). Plaintiff challenges governmental action taken in the public interest pursuant to a statutory or regulatory scheme, and therefore, plaintiff must show a likelihood of success on the merits for the court to grant his request for a preliminary injunction.

Under the First Amendment, a content-neutral regulation that restricts the time, place, and manner of protected speech is constitutionally acceptable, provided that it is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication." *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989). The statute plaintiff challenges is content-neutral. It prohibits the posting of "any handbill, poster, notice, sign or advertisement" on public property without regard to message or viewpoint. *See e.g., Buckley v. Valeo,* 424 U.S. 1, 18 (1976) (only regulations which do not discriminate among speakers or ideas are content-neutral). The Supreme Court has stated

that "[l]ampposts can of course be used as signposts, but the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." *City Council v. Taxpayers for Vincent,* 466 U.S. 789, 814 (1984).

The *Vincent* case is directly on point to plaintiff's instant challenge. Roland Vincent was a candidate for election to the Los Angeles City Council. A group of his supporters contracted to have signs printed and posted with Vincent's name. The signs were attached to utility poles at various locations around Los Angeles. Under a section of the Municipal Code, city employees removed the signs. Vincent's supporters sought an injunction against the enforcement of the ordinance as well as damages. The District Court concluded that the ordinance was constitutional. The Court of Appeals concluded that the City had not justified the statute's total ban. The Supreme Court reversed and remanded the judgment of the Court of Appeals finding the ordinance constitutional. The Court stated:

> [t]he problem addressed by this ordinance – the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property – constitutes a significant substantive evil within the City's power to prohibit. . . . The incidental restriction on expression which results from the City's attempt to accomplish such a purpose is considered justified as a reasonable regulation of the time, place, or manner of expression if it is narrowly tailored to serve that interest. . . . The District Court found that the signs prohibited by the ordinance do constitute visual clutter and blight. By banning

> these signs, the City did no more than eliminate the exact source of the evil it sought to remedy.

Vincent, 466 U.S. at 807-08.

Plaintiff argues that *Vincent* can be distinguished because the size of the bumper stickers that he posted, or seeks to post, are smaller than the signs at issue in *Vincent.* Plaintiff's Memo at 9; Transcript at 15. The fact that plaintiff sought to post bumper stickers instead of signs does not distinguish *Vincent.* "Any tangible property owned by the government could be used to communicate – *bumper stickers* may be placed on official automobiles – and yet appellees could not seriously claim the right to attach "Taxpayer for Vincent" bumper stickers to city owned automobiles." *Vincent,* 466 U.S. at 815, n.31 (emphasis supplied).

Upon the showing made here, plaintiff has not met his burden for a preliminary injunction as he has not demonstrated a likelihood of success on the merits. Defendant has indicated it intends to move to dismiss the complaint. The Court has asked the City to specifically brief the exception in the anti-posting statute granted to the City Council and other city agencies. Defendant's motion shall be filed on or before March 28, 2002. Plaintiff shall oppose defendant's motion on or before April 15, 2002. Any request for an extension of time shall be made in writing at least 48 hours prior to the scheduled deadline.

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall

have ten (10) days from service of the Report to file written objections. *See also* Fed. R. Civ. P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court. Any request for an extension of time to file objections must be made to the District Judge within the ten day period. Failure to file a timely objection to this Report generally waives any further judicial review. *See Thomas v. Arn,* 474 U.S. 140, 155 (1985).

SO ORDERED.

/s/ Lois Bloom
LOIS BLOOM
United States
Magistrate Judge

Dated: Brooklyn, New York
February 15, 2002

Courier-Life Publications
New York's Leading Weekly Community Newspapers
1733 Sheepshead Bay Road,
Brooklyn, New York 11235-3606

THE ARTICLE "POST AT YOUR OWN RISK: NEW CRACKDOWN ON ILLEGAL SIGNAGE" APPEARED IN THE NOVEMBER 20, 2000 EDITION OF THE KINGS COURIER.

/s/ Clifford Luster
CLIFFORD LUSTER

Post At Your Own Risk: New Crackdown On Illegal Signage

By Melissa Robbins

Signs, signs, everywhere the signs.

It is nearly impossible to look up these days without being accosted by advertisements for everything from cigarettes to health insurance plans, local churches to adult entertainment.

But, with the latest crackdown on billboard regulations, city officials are driving home a message of their own – that illegal postings won't be tolerated anymore.

At a meeting hosted by Brooklyn Borough President Howard Golden this week, local community leaders turned out for a hearing on a proposed amendment to the city zoning regulations that govern signage.

The meeting, held at Borough Hall on 209 Joralemon Street, follows closely on the heels of a decree by Mayor Giuliani earlier this month announcing a citywide initiative to eradicate illegal billboards.

Addressing the issue that has long exasperated many local elected officials, Department of City Planning representative Kenneth Bergin explained the need for across-the-board application of regulations.

"Nonconforming signs are generally allowed to continue," said Bergin, "as long as a degree of nonconformity remains."

The new amendment, which will soon go before the City Council, would institute size limits for signs within 200 feet of designated arterial highways and public parks.

Proposed by the Department of City Planning, the amendment would also extend signage regulations to manufacturing districts, which remain largely unprotected by the regulations currently in place.

However, Bergin explained, in mixed-use districts that are zoned for both residential and commercial purposes, the amendment would have little power to regulate signs posted on private buildings.

The Brooklyn Borough Board, comprised of 16 City Council members and 18 Community Board chairs, voted unanimously to accept the new amendment and recommended that further stipulations been [sic] added to its text.

In addition to the size and location limits, the board suggested that significantly stiffer penalties be instituted for violations of sign regulations, which currently carry fines of only $500.

The board further advocated for the prohibition of illuminated signs related to adult entertainment. And, in response to a criticism of disparate enforcement, the board called for the City Council and administration to adopt a

budget modification that would divide resources equally among the boroughs for inspections and the adjudication of violators.

"The whole thing," said Borough President Golden, "is a question of enforcement. If there is no enforcement, [illegal signs] continue to proliferate."

Blasting the city administration for subsidizing Manhattan's cleanup at the expense of the other boroughs, Borough President Golden said, "There have not been enough resources invested in Brooklyn."

Golden said that while money and energy have been spent to enforce adult entertainment restrictions in Times Square, Brooklyn's Sunset Park has meanwhile become "the new Times Square South" due to the lack enforcement resources. And Brooklyn, he said, has developed a reputation as "a safe haven for adult entertainment."

Golden testified to a 500 percent increase in the erection of "apparently illegal" billboards along Brooklyn highways since 1994, when a study commissioned by his office documented 26 of such questionably legal postings.

"We've been doing this since 1994 and we've been ignored by the Buildings Department as well as the city administration," said Golden. "All of a sudden, everyone's starting to talk about it. I guess the real estate interests in Manhattan are beginning to complain."

[SEAL] THE COUNCIL OF THE
CITY OF NEW YORK
FINANCE DIVISION
LARIAN ANGELO, DIRECTOR
FISCAL IMPACT STATEMENT

INTRO NO: 146A

COMMITTEE: Sanitation and Solid Waste Management

TITLE: A Local Law to amend the Administrative Code of the City of New York, in relation to unlawful posting.

SPONSOR: Council Member McMahon, Weprin, Golden, Filder, Oddo, Provenzano, and Liu, Addabbo, Quinn, and Koppell.

SUMMARY OF LEGISLATION: The proposed local law would amend Sections 10-119 and 10-120 of the New York City Administrative Code, increasing the civil penalties for the first and subsequent violations of unlawful postings and or the vandalism of any City printed and posted materials. The proposed law would increase the civil penalties for the first violation of sections 10-119 and 10-120. The penalties for a first violation will increase from the range of $50-$100 to $75-$150. Subsequent violations within a twelve-month period will have penalties that range from $150-$250. Violators will also be responsible for the cost of the removal of the unauthorized signs. The proposed local law would authorize the Mayor to offer and pay a reward in amount not exceeding $500 to any person who provides information leading to the criminal conviction of any person who may have violated the law.

EFFECTIVE DATE: This local law would take effect immediately.

FISCAL YEAR IN WHICH FULL FISCAL IMPACT ANTICIPATED: Fiscal 2004

FISCAL IMPACT STATEMENT:

	Effective FY03	FY Succeeding Effective FY03	Full Fiscal Impact FY04
Revenues (+)	$1,036,950-$2,073,900	$2,073,825-$4,147,650	$2,073,825-$4,147,650
Expenditures (-)	$0	$0	$0
Net	$1,036,950-$2,073,900	$2,073,825-$4,147,650	$2,073,825-$4,147,650

IMPACT ON REVENUES: The revenue generated is based on the average number of fines issued in FY 2001 and FY 2002 (27,651) and the penalty range ($75-150) for a first violation.

IMPACT ON EXPENDITURES: There would be no impact on expenditures resulting from the enactment of this legislation.

SOURCE OF FUNDS TO COVER ESTIMATED COSTS: N/A

SOURCE OF INFORMATION: Office of Management and Budget.

ESTIMATE PREPARED BY: Veronica McNeil, Legislative Financial Analyst
Latonia McKinney, Assistant Director
City Council Finance Division

FIS HISTORY: To be considered by the Committee on November 15, 2002